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A MOST instructive view of the legislation of the past year is presented in the address delivered at the last meeting of the American Bar Association, by the President, Hon. Henry Hitchcock.[1] From the two hundred and nineteen public acts of Congress, and the eight thousand two hundred and ninety-four acts and joint resolutions passed by the twenty States which enacted laws during the year, Mr. Hitchcock has selected and summarized the most important. One of the most striking facts is the tendency toward paternal government shown by the enactment of numberless regulations upon trade and manner of life. As a single instance may be mentioned a statute in Michigan, "requiring the words 'skimmed milk' to be painted in letters an inch long on all vessels containing milk for sale from any part of which the cream has been removed."

Another fact, especially worthy of notice, is the extent to which the constitutions of the newly admitted States carry out the tendency, already well developed in the more modern American constitutions, to narrow the field for legislative action by endless constitutional provisions covering subjects more properly to be dealt with by statutes. Mr. Hitchcock also notes the facts that many of the State constitutions restrict their legislatures to general, as distinguished from private, legislation; and that thirty-nine out of the forty-four States prescribe biennial, instead of annual, sessions. He refuses, however, to draw the conclusion, often suggested, that these facts show a distrust of representative institutions, or, in the words of Mr. Bryce, that "this method of restricting legislative opportunities for mischief, though a consistent application of the Puritan doctrine of original sin, is rather a pitiful result for self-governing democracy to have arrived at."

Mr. Hitchcock, on the contrary, regards these restrictions as but another application of that characteristic principle of American government, the "check and balance" system. The mere fact that, because legislatures have been running wild, certain checks have been imposed, shows not the failure of democracy, but rather its power to regulate and keep under control its own machinery.

[1] A YEAR'S LEGISLATION. The President's Address at the Thirteenth Annual Meeting of the American Bar Association, August 20, 1890. Dando Printing & Publishing Co., Philadelphia.

WITHIN the last few weeks three very interesting cases have come up in the Supreme Court of Massachusetts in the matter of liquor sold in private clubs in a prohibition town. These cases decide that such clubs are within the prohibition of the statute, and are common nuisances.

The first case is that of *Commonwealth* v. *Jacobs*, the steward of the Warren Social Club, of Worcester. Defendant had been accustomed to order large quantities of liquor from wholesale dealers. This liquor was brought to a place kept by the club, and stored there, under the supervision of the steward, in the names of individual members, who called for it from time to time as they wanted it. The court held that this was as much within the provisions of the statute "as if the liquors were bought and dispensed as the property of the club."

In the second case, that of *Commonwealth* v. *Ryan*, steward of the Pelican Club, of Worcester, it appeared that the members had attempted to evade the statute by having a number of lockers, one for each member; in each locker was stored a quantity of liquor, each bottle being labelled with the name of the owner. The defendant was duly convicted, and the court, in affirming the conviction, said that "there was evidence from which a jury might have inferred" that the arrangement in question was "a mere device to cover up the unlicensed sale of intoxicating liquors. The court could not say, as a matter of law, that there was no evidence to warrant a conviction."

The third case was that of *Commonwealth* v. *Baker*, steward of the Commercial Social Union, of Worcester. Defendant set up the defence that the club did not fall within the provisions of the statute, which declares that "all buildings or places used by clubs for the purpose of selling, distributing, and dispensing intoxicating liquors to their members or others, shall be deemed common nuisances."[1] The club in question owned no liquor itself, and only dispensed it to those of its members to whom it belonged. Defendant contended that the statute did not prohibit the use of rooms for such a purpose, but the court denied the force of the contention in the following passages from the opinion: —

"A place must be equally a nuisance under the statute whether used by a club to sell intoxicating liquor to its members, or to distribute among its members intoxicating liquors owned by them in common, or to procure for and dispense to its members intoxicating liquor which was bought for and belonged to them individually.

"If the club, by its agent, purchased and stored intoxicating liquors for its members, and dealt out in portions to each member, upon his order, the liquor belonging to and kept for him, and kept the place for that purpose, the place is a common nuisance under the statute.

"The club in the case at bar used its rooms for a purpose for which a license was required. It not only had no license, but it was in a city where such license is prohibited. As the evidence not disputed by the defendant showed that the club used its rooms for the purpose of dispensing intoxicating liquor to its members, it is unnecessary to consider whether, upon the whole evidence, the jury could properly have found that the club used the place for the sale of intoxicating liquor."

In view of these decisions, it will be practically impossible for clubs formed and incorporated for "purposes of social intercourse" to keep

[1] Mass. Rev. Sts. 1887, c. 206.

within their walls liquor of any description — that is, of course, in a prohibition town; and apparently no device which the ingenuity of their members can suggest, would be sufficient to exempt them from liability under the statute. The words of the statute are "all buildings or places used by clubs for the purpose of selling, distributing, and dispensing," etc. In order to escape liability, the defendant would have to prove that the club was not used for the purpose mentioned. To do this, he would probably have to show that the club itself does not own any liquor; that it does not sell, distribute, nor dispense it; that each member keeps at the club — as he might with impunity at his private house — a private stock of liquor, which, if purchased for him by the steward of the club, must be shown to have been purchased by his special authority, and not by that of the club, the steward being his agent, and not the agent of the club; and that payment for the liquor was made by him to the dealer, and not to the club. Even if he proved all this, the courts would probably find some means of bringing the club within the meaning of the statute.

It may be of interest to print the following extract from the report of the committee, consisting of Lord Coleridge and other distinguished persons, which was appointed by the Lord Chancellor in 1881 to investigate the desirability of changes in the procedure of the High Court of Justice. In his article on the Burden of Proof, in the May number of this Review,[1] Professor Thayer refers to this report. It appeared in full in the "London Times," of Oct. 8, 1881, but, so far as we know, has not been reprinted.

"The committee had, in the first place, to consider how far it was desirable, in order to expedite the proceedings in an action, to combine with the writ of summons a statement of the plaintiff's demand, to which the defendant, when he appeared, might be required to put in his answer. The committee directed an examination to be made of the judicial statistics for 1879, with the view to the solution of this and the other questions relating to procedure submitted for their consideration, and the following results have been arrived at: In the year 1879 there were issued in the divisions of the High Court in London — writs, 59,659. Of the actions thus commenced, there were settled, without appearance, 15,372, *i. e.*, 25.68 per cent.; by judgment by default, 16,967, *i. e.*, 28.34 per cent.; by judgment under Order XIV., 4,251, *i. e.*, 7.10 per cent.; total of practically undefended cases, 36,590, *i. e.*, 61.12 per cent.; cases unaccounted for, and therefore presumably settled or abandoned after some litigation, 20,804, *i. e.*, 35.10 per cent. The remaining cases were thus accounted for: Decided in court, — for plaintiffs, 1,232; for defendants, 521; before masters and official referees, 512; total, 2,265; that is, 3.78 per cent. of the actions brought. From these figures it seemed clear that the writ in its present form was effective in bringing defendants to a settlement at a small cost, and that it was unadvisable to make any alteration by uniting it with a plaint or other statement of the plaintiff's cause of action, which would add to the expense of the first step in the litigation.

"In the next place, the committee had to consider how far it was possible, in those cases in which litigation was continued after the appear-

[1] 4 Harv. L. Rev. 57.

ance of the defendant, to adopt a procedure (1) for ascertaining the cases in which there is a real controversy between the parties; (2) for diminishing the cost of litigation in cases which are fought out to judgment. The committee is of opinion the questions in controversy between litigants may be ascertained without pleadings. In the 20,804 cases which, as appeared from the statistics of 1879, were either settled or abandoned without being taken into court, it may reasonably be supposed that pleadings were of little use. Of the cases which go to trial it appears to the committee that in a very large number the only questions are — Was the defendant guilty of the tortious act charged, and what ought he to pay for it? or, Did the defendant enter into the alleged contract, and was it broken by him? And in a great many others the pleadings present classes of claims and defences which follow common forms. We may take, for instance, the disputes arising out of mercantile contracts for sale, of affreightment, of insurance, of agency, of guarantee. The cases of litigants are usually put forward in the same shape, the plaintiff relying on the contract and complaining of breaches; the defendant, on the other hand, denying the contract or the breaches, or contending that his liability on the contract has terminated. The questions in dispute are, as a general rule, well known to the plaintiff and the defendant. It is only when their controversies have to be reproduced in technical forms that difficulties begin."

THE application of the maxim *Sic utere tuo ut alienum non lædas* to adjoining land-owners has given the courts much difficulty, and the law on the subject is by no means clear; but it is safe to say that few cases have gone so far as *Reinhardt* v. *Mentasti* (42 Ch. D. 685), decided last year in the Chancery Division in England. The defendant in that case, who kept a hotel in a part of London where, as the court said, hotels were conveniently built, used in his kitchen a stove "of an ordinary character and well constructed." Kekewich, J., while admitting that this use of the defendant's property was perfectly reasonable, granted an injunction because the stove and the hot-air shaft connected with it raised the temperature of the plaintiff's wine-cellar, on the other side of the partition wall, and made it unfit for the purpose of storing wine. He relied much on the case of *Broder* v. *Saillard* (2 Ch. D. 692), (a case of noise from a stable, which seriously interfered with the plaintiff's sleep; it may be observed that the stable was built, in the language of Jessel, M. R., "not as stables usually are, but next to the wall of the plaintiff's dwelling-house"), and treated the reasonableness of the defendant's acts as immaterial, regarding the inquiry whether the plaintiff had suffered damage as the sole test. "The real question is, does he [the defendant] injure his neighbor?" So literal an interpretation of the maxim *Sic utere tuo* seems to call for the remark of Earl, J., in *Campbell* v. *Seaman* (63 N. Y. 568, 576), "It does not mean that one must never use his own so as to do any injury to his neighbor or his property; such a rule could not be enforced in civilized society." As the law is laid down in *Reinhardt* v. *Mentasti*, the question of reasonableness seems to be somewhat one-sided; from the defendant's point of view the court's solicitude for the plaintiff's wine-cellar at the expense of his cooking-stove cannot seem altogether reasonable.

It is true that *Hole* v. *Barlow* (4 C. B. N. S. 334), which laid it

down broadly that what would otherwise be a nuisance could be justified by showing that it was done in a "convenient place," was overruled in *Bamford* v. *Turnley* (3 B. & S. 62); but the language of the court in the latter case is worthy of attention as indicating the exact scope of the decision. Bramwell, B., for example, who concurred in overruling *Hole* v. *Barlow*, said that "those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action," though the same acts would be nuisances if done wantonly or maliciously. And the leading case of *St. Helen's Smelting Co.* v. *Tipping* (11 H. L. C. 642) shows that the principle on which *Hole* v. *Barlow* was decided cannot be wholly ignored, that the court cannot escape considering the nature and reasonableness of the act complained of. According to the charge of Mellor, J., of which the House of Lords expressed particular approval, "everything must be looked at from a reasonable point of view," and the jury must take into account "all the circumstances, including those of time and locality." In view of such expressions as these, and of Vice-Chancellor Knight Bruce's well-known observation in *Walter* v. *Selfe* (4 De G. & Sm. 315, 322), that the test is not to be found in "elegant and dainty modes and habits of living," but in the "plain and sober and simple notions among English people," one is not very seriously impressed with the damage suffered by the plaintiff on such facts as appear in *Reinhardt* v. *Mentasti*.[1] Moreover, as is pointed out in 6 Law Quarterly Review, 114, it is not altogether easy to reconcile the decision with *Robinson* v. *Kilvert* (41 Ch. Div. 88), where a similar radiation of heat from the defendant's boilers, not great in itself, but causing serious damage to delicate processes of manufacture carried on by the plaintiff, was held by the Court of Appeal not to be a nuisance.

THE LAW SCHOOL.

LECTURE NOTES.

[These notes were taken by students from lectures delivered as part of the regular course of instruction in the School. They represent, therefore, no carefully formulated statements of doctrine, but only such informal expressions of opinion as are usually put forward in the class-room. For the form of these notes the lecturers are not responsible.]

MENS REA IN CRIMINAL CASES. — (*From Mr. Chaplin's Lectures.*) — One often finds the rule laid down that the *mens rea*, or criminal intent, must always be proved in order to maintain a criminal prosecution. This, however, is far from true, or at most can only be stated as a general principle subject, like most general principles, to limitations.

I. It is not always and invariably essential at common law that one should have a criminal, or even a wrongful, intent. In cases, for example, of religious belief, it has been held unnecessary to prove the *mens rea* (as where a father, believing it sinful to seek medical aid in time of sickness, rather than to have faith in prayer, was charged with the death of his infant son).[2] In the case of *Rex* v. *Ogden*,[3] where the prisoner was indicted for unlawfully transposing from one gold ring

[1] Compare the remarks of Dodderidge, J., in *Jones* v. *Powell*, Palmer, 536: "Si home est cy tender nosed que ne poit indurer Seacole it doit lesser son mease."

[2] *Reg.* v. *Downes*, 13 Cox, C. C. 111.

[3] 6 C. & P. 631.